BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PHILIP REED	)	
Claimant	)	
VS.	)	
	)	Docket No. 148,508
CITY OF OLATHE	)	
Respondent	)	
Self-Insured	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals from a June 21, 1994 Award entered by Administrative Law Judge Alvin E. Witwer.

APPEARANCES

Claimant appeared by and through his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Mary Owensby Thompson of Kansas City, Missouri. The Workers Compensation Fund appeared by its attorney, Ronald P. Wood of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

Claimant has requested review of the findings related to nature and extent of disability. He contends that the Award should be for a higher percentage of work disability. Claimant also objects to the admission of the deposition testimony of Kathy Schauwecker. In addition, claimant raises an issue concerning the authority of the Administrative Law Judge to enter the Award.

The Kansas Workers Compensation Fund (hereinafter Fund) seeks review of that portion of the Award finding it to be totally responsible for the payment of the Award. Accordingly, the issues can be summarized as follows:

(1) Nature and extent of disability.

(2) The admissibility of Kathy Schauwecker's testimony.

(3) Jurisdiction of the Administrative Law Judge to enter an Award.

(4) Fund liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) The Appeals Board agrees with the finding by the Administrative Law Judge regarding nature and extent of claimant's disability and concludes that the permanent partial disability Award based upon a 40 percent work disability should be affirmed.

The Administrative Law Judge found claimant was entitled to permanent partial general disability compensation based upon the agreed 22 percent functional impairment rating during the period claimant was working prior to claimant's retirement. Thereafter, he would be entitled to permanent partial disability compensation based upon a 40 percent work disability. The percentage of work disability was arrived at by averaging a 30 percent loss of ability to perform work in the open labor market with a 50 percent loss of ability to earn a comparable wage, applying the formula approved by the Kansas Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

Claimant agrees with the Administrative Law Judge's determination of the percentage loss of claimant's ability to earn a comparable wage. However, claimant disagrees with the 30 percent loss of access to the open labor market finding, arguing instead that the loss is between 75 and 80 percent. Respondent and the Fund agreed with the 30 percent labor market loss and further pointed out an 11 percent loss could be justified if it were determined that claimant could perform all of the medium job categories.

Opinions concerning claimant's physical limitations and recommendations for restrictions were offered by three physicians: Dr. Edward J. Prostic, Dr. Roger W. Hood and Dr. Robert M. Drisko II. Each gave different opinions concerning claimant's physical capabilities and each recommended different restrictions.

Vocational expert Michael Dreiling testified on behalf of the claimant. He utilized only the medical opinions of Dr. Drisko. Based thereon, it was Mr. Dreiling's opinion that claimant had sustained an 88 percent loss of access to the open labor market.

The respondent and the Fund offered the vocational opinion testimony of Kathy Schauwecker. She was given the records of all three physicians and determined therefrom that claimant's loss of access to the open labor market was between 30 percent and 32 percent. She further opined that the labor market loss could be as low as 20 percent.

The Administrative Law Judge discounted the labor market loss opinion of Mr. Dreiling for several reasons, including the fact that he did not consider the medical reports of Dr. Prostic or Dr. Hood and that Mr. Dreiling appeared to limit the claimant's employment opportunities to sedentary work only. The Administrative Law Judge was of the opinion that claimant was able to function in the sedentary, light and most of the medium work occupations. However, claimant would be precluded from performing all work in the heavy and very heavy job categories. The record shows that the heavy and very heavy job categories comprise 11 to 12 percent of the open labor market. The medium category represents 31 to 35 percent. Assuming claimant could perform some, but not all, in the medium category, the Administrative Law Judge apparently determined claimant to have lost the ability to perform an additional 18 to 19 percent of the jobs in the open labor market from those contained within the medium category. Combined, then, this loss totaled 30 percent of the total open labor market. When averaged with a 50 percent loss of ability to earn a comparable wage, the claimant was found to possess a work disability of 40 percent to the body as a whole, from the date he retired from his job with the fire department. The Appeals Board agrees with and affirms that finding by the Administrative Law Judge.

(2) Claimant objects to the admission of the deposition testimony of vocational consultant Kathy Schauwecker. Claimant contends the deposition should be excluded because it was taken beyond respondent's terminal date. The Administrative Law Judge determined the deposition was timely taken and he considered the testimony in making his Award. Judge Witwer pointed out that although the testimony of Ms. Schauwecker was taken slightly beyond respondent's terminal date, it was within the terminal date for the Fund. At the time of the deposition counsel for respondent and counsel for the Fund announced that the deposition was being taken on behalf of both the respondent and the Fund. The Administrative Law Judge overruled the objection by claimant's counsel and admitted Ms. Schauwecker's testimony into evidence. The Appeals Board agrees with the ruling by the trial court. Accordingly, the testimony of Ms. Schauwecker has, likewise, been considered as a part of the evidentiary record by the Appeals Board.

(3) Following the expiration of terminal dates and the completion of the record, claimant submitted its case by letter of March 11, 1994. Thereafter, on June 1, 1994, claimant wrote the Director of Workers Compensation requesting the case be assigned to another administrative law judge or special administrative law judge pursuant to K.S.A. 44-523(c). A second request was sent June 17, 1994. The Administrative Law Judge entered his Award on June 21, 1994. Claimant appeals that Award contending the Administrative Law Judge was without jurisdiction to decide the case. Claimant bases his contention on the mandatory language of K.S.A. 44-523(c) which requires the Director to transfer a case upon request whenever an award is not issued within 30 days after a case is submitted.

K.S.A. 44-523(c) provides:

> "When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. When the award is not entered in 30 days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director or to a special administrative law judge who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the

> administrative law judge who has not entered an award within 30 days following submission by the party and assign it to an assistant director or to a special administrative law judge for immediate decision based on the evidence in the record."

This argument has been made to the Appeals Board on prior occasions. We have consistently held that a filing of a letter or motion requesting transfer does not divest the administrative law judge of jurisdiction until such time as an order removes the case from the administrative law judge and assigns it elsewhere. In the case of Ronald L. Reinhart v. Superior Industries Int'l, Docket No. 180,932 (June 24, 1995), we said:

> "[T]he filing of a notification of tardy decision or of a request for transfer does not act as an automatic or instantaneous transfer of the case from the administrative law judge to which it was originally assigned. Because the Director had not removed the proceeding from the Administrative Law Judge nor reassigned it before the Award was issued, the Administrative Law Judge retained jurisdiction over the proceeding and the authority to enter the Award."

The Appeals Board's decision in Reinhart was appealed to the Court of Appeals and affirmed in an unpublished decision.

We again reject the argument that the filing of a request under K.S.A. 44-523(c) operates to automatically deprive the administrative law judge of jurisdiction to enter an award. *See* Davis v. Haren & Laughlin Construction Co., 184 Kan. 820, 339 P.2d 41 (1959).

(4) The Fund is responsible for 100 percent of the cost of this Award. The Administrative Law Judge so found, adopting the "but for" opinions of both Dr. Hood and Dr. Prostic. The Fund disagrees arguing that Dr. Hood did not give a "but for" opinion. The Fund contends Dr. Hood apportioned claimant's disability between the preexisting condition and the new injury which is the subject of this claim.

There is no dispute that claimant was a handicapped employee within the meaning of K.S.A. 44-566(b). Furthermore, the Fund apparently concedes the fact that respondent retained claimant in its employment with knowledge of that handicap. K.S.A. 1988 Supp. 44-567(a) relieves an employer of liability for compensation awarded to a handicapped worker under certain circumstances. Where the employer is relieved of this liability, the responsibility is assessed either partially or totally to the Fund.

In this case, the Fund's liability was based upon a finding that claimant's current disability would not have occurred "but for" his preexisting physical impairment. The Administrative Law Judge found no conflict between the testimony of Dr. Hood and that of Dr. Prostic on this issue. The Fund contends that the Administrative Law Judge was in error in that the testimony of Dr. Hood did not contain a "but for" opinion. Dr. Hood's testimony is significant because he was the only physician testifying in this case who saw the claimant both before and after his injury of March 11, 1989. After summarizing claimant's history of low back problems, Dr. Hood testifies at page 21 of his deposition that claimant's March 11, 1989 injury probably would not have occurred "but for" his preexisting low back impairment. On cross examination, Dr. Hood does assign an increase in claimant's functional impairment rating over that which he had prior to his March 11, 1989

injury. He attributes the increase to the subject injury. However, Dr. Hood does not retreat from his earlier "but for" opinion. In light of his earlier "but for" testimony, we do not consider Dr. Hood's testimony concerning the change in functional impairment ratings to constitute an opinion for apportionment of liability between the respondent and the Fund.

Based upon the record taken as a whole, the Appeals Board finds that it is more probably true than not that claimant's March 11, 1989 injury and resulting disability would not have occurred "but for" his preexisting impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Alvin E. Witwer dated June 21, 1994, should be, and hereby is, affirmed in all respects. The orders of the Administrative Law Judge set forth in said Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Mary Owensby Thompson, Kansas City, MO
Ronald P. Wood, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director